IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 127 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

STATE BANK OF SAURASHTRA

Versus

HARSHADRAI PRABHUDAS MEHTA

Appearance:

MR AS VAKIL for Petitioner

MR RD DAVE for Respondent No. 1

RULE SERVED for Respondent No. 2

MR DHARMESH V SHAH for Respondent No. 4

MR YN RAVANI for Respondent No. 5

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 23/04/98

ORAL JUDGEMENT

Heard the learned counsel for the parties. The appeal is directed against order dated 2nd January, 1998 passed by the Second Joint Civil Judge, (S.D.), Junagadh in Special Civil Suit No. 144 of 1997 on an application

under Order 39, Rule 1 and 2 of the Code of Civil Procedure. Respondent No. 1 Harshad Prabhudas Mehta had filed the present suit for restraining the defendants from alienating the property in question which is situated at Manavadar,District : Junagadh.

2. According to the plaintiff, the property in question is ancestral property of the plaintiff and his two brothers, defendant NO. 4 and 5 having equal share therein. He has filed suit for partition of the suit property. Present appellant defendant No. 1 State Bank of Saurashtra has filed special civil suit no. 141 of 1997 in the court of Civil Judge, (S.D.) at Bhavnagar against the principal debtor as well as present defendants no. 4 and 5 which suit was subsequently transferred to the Debt Recovery Tribunal ("DRT" for short) on its being established. The Tribunal has passed decree in the said suit on 9.7.l997 against the defendants in that suit including defendants no. 4 and 5 for a sum of Rs. 1,27,56,012.10 ps. together with interest thereon. For the recovery of the said debt, recovery certificate was issued and the DRT entrusted to recover the debt certified in the said certificate, has attached the property in question. The plaintiff's case is that defendants no. 4 and 5 have mortgaged the suit properties against the debt outstanding of defendant no. 1 as well as the other properties which were situated at Bhavnagar. The grievance of the plaintiff is that instead of recovering the dues from the other properties of the debtors, said defendants nos. 4 and 5 in collusion with the officers of the defendant No. 1 bank, are proceeding to recover the debt out of the said properties. Therefore, the plaintiffs prayed that on the basis of the award declared by the defendant No. 2 DRT or on the basis of a certificate that may be issued on its basis, defendant No. 3, Debt Recovery Officer or defendant No. 1 decree holder be restrained from selling, alienating, transferring in any manner the property, land, machinery etc. of defendants no. 4 and 5 and be restrained from making any change in the situation that prevailed on the date of filing of the suit. The trial Court by referring to the documents mark 4/1 to 4/19, came to the conclusion that prima facie the suit property is joint ancestral property and on the said premises, refused to look into the evidence adduced by defendant No. 1 alleging that the suit property does not belong to the plaintiff by stating that though they are good piece of evidence, same cannot be taken into consideration and consequently on solitary conclusion that prima facie appears to be ancestral and joint property, passed order and restrained the defendants from

transferring or alienating in any manner the suit property, land, construction portion, plant, and machinery and also restrained them from indulging in transferring the same in any manner and thereby, directed them to maintain status quo qua suit properties.

The appellant in this appeal has urged that the trial court has seriously erred in not looking at the evidence of the defendants at all to find out whether the plaintiff has any right, title or interest in the property before coming to the conclusion that the plaintiff has a prima facie case. This discloses that the trial court has decided the injunction application without application of mind as if it has to take into consideration the material produced by the plaintiff only and has not to take into consideration the material placed by the defendant who are contesting the injunction application. The appellant has also submitted an application for taking additional evidence on record at this stage pointing out that the property in question does not stand in the name of the plaintiff at all but the property is owned by the private limited company and it has vested in the private limited company by the acts of erstwhile holder of the property and merely by reference to old entries in the revenue records and the Municipal records, it cannot be said that the plaintiff has been able to prove his prima facie case. This fact that property in question became the property of a Limited Company by first contributing to a firm of which holder and the said Company were partners and, thereafter, all parties excluding the company walked out of it leaving the property to the company. However, the plaintiffs urged that in absence of proper document of transfer, the property cannot be said to be of Company and the said transaction is not subject matter of enquiry at this stage. It has also been urged that even on plaintiff's own case, even if it is accepted in full, he cannot seek injunction against execution of the decree passed in favour of the bank by the court of competent jurisdiction against the undivided share of respondents no. 4 and 5 in the ancestral property as the same is liable to be attached and sold in execution of their personal debt. Attention of this court was drawn to the law relating to sale or mortgage of undivided interest of coparcener in joint family governed by Mitakshara School and Hindu Law from Mulla's Hindu Law. Firstly, it was pointed out that according to Mitakshara School, as administered in the Bombay and Madras States, a coparcener may sell, mortgage, or otherwise alienate or value his undivided interest in coparcenary property without the consent of the other coparceners. Likewise,

with reference to paragraph 289 of the same Book, according to Mitakshara law as applied in all the States, the undivided interest of a coparcener may be attached in his life time in execution of a decree against him for his personal debt. If it is attached in his life time it maybe sold even after his death whether the order for sale was made in his life time or after his death but it cannot be attached after his death.

From the perusal of the order, it is apparent that the trial court has kept out of his consideration the material placed by the defendants in respect of their case that the plaintiff has no right over the suit property. The fact that the plaintiff has to establish his prima facie case before his prayer for temporary injunction can be considered does not rest on the principle that for that purpose, the only material placed by the plaintiff has to be considered as in the case of considering the maintainability of the suit or the question of cause of action on the basis of plaint allegation. It is required of law that even before ad-interim order is issuedother party be issued notice and heard. Ordinarily, no ex-parte injunction can be issued and it should be issued only after the notice to the other side is given to afford it an opportunity to place his case before the Court.The opportunity to be afforded is not an empty formality but has to be an effective opportunity, permitting the defendant to place his case before the Court and order has to be made onlyafter taking into consideration defence and material placed in support of it. It is, therefore, abundantly clear that the obligation of he Court is to examine the material placed before it by both the sides and it cannot exclude from its consideration the material placed by the plaintiff or the defendant for any reason. The value to be attached to it is altogether a different question. Thus, the manner in which the trial court dealt with the injunction application leave much to be desired. The order of the trial court, therefore, deserves to be set aside on this ground alone. Apart from aforesaid reason, the controversy which arise from the records and pleadings is whether any injunction restraining the party from executing the decree passed in his favour in independent proceedings and to proceed against the property or part of the property which undisputedly belong to the judgment debtor could or should be granted in such a suit and whether on the averments made by the plaintiff himself, the co-owners' interest to the extent admitted is liable for attachment and sale in execution of decree passed by the DTR, such questions ought to have been considered by the trial court before issuing

injunction order in the form in which it has been issued.

Since the defendants' right to produce material evidence in the course of trial is still open to it, the material which is now being placed alongwith the application for taking additional evidence in the appeal also deserves consideration. However, as discussed above, this appeal deserves to be allowed by setting aside the order under appeal. SO far as the question of leading additional evidence in support of its plea is concerned, the appellant shall be free to submit those documents in the trial court before hearing of plaintiff's application LExh.5. The appeal is accordingly allowed. Order of the trial Court dated 2nd January, 1998 is set aside. The trial Court is directed to decide the application Exh. 5 for temporary injunction filed by the original plaintiff afresh in accordance with law. It will be open for either parties to produce the material in support of their respective cases and to raise all pleas that are raised in this appeal on merits. The trial Court shall decide the application for temporary injunction expeditiously, asfar as possible, within six weeks.

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Vyas